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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 359

EUNICE RICE MILLING COMPANY,
Petitioner,

versus

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT ON APPLICATION FOR WRIT OF CERTIORARI.

May It Please the Court:

A writ of certiorari should not be granted for the following reasons:

1. The question in this case is not one of general interest or importance and does not involve any novel or unsettled questions of law.
2. This case does not involve a question of law or fact, in any manner different from the case of *Fisher v. Home Indemnity Company, 198 Fed. (2d) 218.*

3. The sole question in the case is whether a state statute may constitutionally impair the obligation of a contract to the extent of invalidating a valid "no action" provision of an insurance contract written and delivered in another state to a resident of that state.

4. The decisions of the Federal Courts control where a statute is said to violate the *Constitution of the United States.*

ARGUMENT.

Point No. 1.

On the date that this cause of action arose, there was in effect in Louisiana, the *Direct Action Statute, Act 55 of 1930.* The statute permits a direct action against a liability insuror by an injured party. The decision of the Court of Appeal involves an interpretation of that *Act* as it affects a policy of insurance issued and delivered in the State of Texas to a resident of Texas, which contains a "no action" clause, valid in Texas. The sponsors of such legislation as *Act 55 of 1930*, apparently realizing that the *Act* could not constitutionally be applied to such contracts introduced and had passed by the Louisiana Legislature in *1950, Act 542 (R. S. 22:983).* Said *Act* requires a foreign or alien liability insuror as a condition precedent to doing business in Louisiana, to consent to be sued under the *Direct Action Statute*, no matter where the policy is written or delivered and regardless of the "no action" provision of the policy. The effect of the statute is to write out of the policy contract, the "no action" clause. *Fisher v. Home Indemnity, 198 Fed. (2d) 218.*

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As to actions in the future, the constitutional objection to the *Direct Action Statute* raised in this case has been eliminated by the filing of the "consent to be sued" by the insurors, inasmuch as the insurors have voluntarily agreed to eliminate the "no action" clause from policies when qualifying to do business in Louisiana. The decision in this case therefore, solves no problems which will come up in the future and is not of general importance.

The constitutional questions decided by the Court of Appeals have been settled by many decisions, some of which are: *Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342; Home Ins. Co. v. Dick, 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701; Belanger v. The Great American Indemnity Co., 89 Fed. Supp. 736, 188 Fed. (2d) 196, Wheat v. White, 38 Fed. Supp. 796; Bayard v. Traders & General Ins. Co., 99 Fed. Supp. 343, Ritterbusch v. Sexmith, 41 N. W. (2d) 611, 256 Wis. 507; Martin v. Zurich, 84 Fed. (2d) 6; Coderre v. Travelers, 48 R. I. 152, 136 A. 305, 54 A. L. R. 512; Riding v. Travelers (R. I.), 138 A. 186.*

Points No. 2 and 3.

The constitutional question involved in this case is: Does Petitioner have the right under the *Direct Action Statute, Act 55 of 1930,* to bring suit against respondent, under the policy contract issued and delivered in the State of Texas, to a resident of Texas which contains a "no action" clause? Stated another way. Can the *Louisiana Statute* affect a policy provision valid and enforcible in Texas where the policy was issued and delivered, so as to

render the contractual provisions invalid and nugatory? Respondent relying on the provisions of the *Constitution of the United States, Article 4, Sect. 1, Article 1, Sect. 10,* and *Section 1 of the Fourteenth Amendment,* avers that this cannot be done. The Court of Appeal so held. The same issue was presented and decided in the case of *Fisher v. Home Indemnity, 198 Fed. (2d) 218.*

Petitioner says that this case is factually different from the *Fisher* case, for the reason that the policy contract undertakes to afford protection to the assured, only insofar as its operations in Louisiana are concerned. In the *Fisher* case, the policy of insurance affords protection to the assured in all of the States of the Union, Louisiana included. The protection afforded by the policy in each case, is substantially the same, except that one is restricted to Louisiana, and the other is not restricted to any particular state. The distinction sought to be made is without legal basis.

The principle announced by the Court of Appeal is that a state may not, by statute or otherwise, invalidate a provision of a contract valid where entered into. It makes no difference that in one case the protection was general, and in the other, limited. Under the theory of Petitioner, a contract issued by an insuror to a resident of one state, protecting him against liability, would be construed in one manner if he travelled or worked in one state alone, and in another manner if in several states. The constitutional protection is not so limited.

This case does not involve a question of law concerning a contract written in one state to be effective in

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another state, so as to bring into operation the principles governing the execution and performance of contracts cited by Petitioner in its brief.

The contract of insurance issued and delivered in Texas to a resident of Texas, agreed to protect him from liability, imposed upon him by law, covering his operations in Louisiana. The contract is one strictly between Respondent and its assured, and was to be performed in Texas. No person other than the assured was given any rights under the contract, under the law of Texas. For breach of the contract by Respondent the assured has a right of action against it in Texas, under its laws. The same situation exists in the *Fisher* case.

Point No. 4.

The Court of Appeal held that *Act 55 of 1930*, when applied to the present case, violates the *Constitution of the United States*. The decisions of the Louisiana Court are not controlling where a statute is said to violate the *Federal Constitution*. In *Irving Trust Co. v. Day, 314 U. S. 566, 62 S. Ct. 398, 86 L. Ed. 452*, this court said:

> "When this Court is asked to invalidate a sta statute upon the ground that it impairs the oblig tion of a contract, the existence of the contract a the nature and extent of its obligation become Fe eral questions for the purpose of determini whether they are within the scope and meaning the Federal Constitution, and for such purpos finality cannot be accorded to the views of a sta court."

To the same effect is *Standard Oil Co. v. Johnson, 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611, Commissioner of Internal Revenue v. Neubar, (4th Cir.) 185 Fed. (2d) 1954; Porter Royalty Pool v. Commissioner, (6th Cir.) 165 Fed. (2d) 933; 21 A. L. R. (2d) 238, 264; Belanger v. Great American, 89 F. Sup. 736.*

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE.

I hereby certify that copies of the above brief have been served on Mr. Grove Stafford, 710 Guaranty Bank Building, Alexandria, La., and Mr. LeDoux Provosty, Guaranty Bank Building, Alexandria, La., attorneys for petitioner herein by depositing same in the United States mail, postage prepaid, on this ..... day of October, 1952.

R. EMMETT KERRIGAN,
Attorney for Respondent.

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